

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JENNIFER O. CATASTINI,)
Plaintiff,) CASE NO. C10-5782-JCC
v.)
MICHAEL J. ASTRUE, Commissioner) REPORT AND RECOMMENDATION
of Social Security,) RE: SOCIAL SECURITY DISABILITY
Defendant.) APPEAL
)
)

Plaintiff Jennifer O. Catastini proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's application for Disability Insurance Benefits (DIB) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends that this matter be AFFIRMED in part and REVERSED in part for further proceedings. Also, defendant's motion to strike (Dkt. 16 at 3) plaintiff's "Appendix of Documentary Evidence" (Dkt 12-1) is GRANTED for the reasons set forth below.

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FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1955.¹ She has at least a high school education and previously worked as a wallpaper hanger. (AR 23-24.)

Plaintiff filed an application for DIB on January 5, 2009, alleging disability beginning August 1, 2007. The onset date was subsequently amended to April 16, 2007. She is insured for DIB through March 31, 2011. (AR 14.) Plaintiff's application was denied at the initial level and on reconsideration. Plaintiff timely requested a hearing.

On March 2, 2010, ALJ Allen G. Erickson held a hearing by videoconference, taking testimony from plaintiff, a medical expert, and a vocational expert. (AR 30-84.) On March 24, 2010, the ALJ issued a decision finding plaintiff not disabled. (AR 14-25.)

Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on August 21, 2010 (AR 1-5), making the ALJ's decision the final decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not engaged in substantial gainful activity since the alleged onset date. At step two, it must be

1 Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's
02 status post mastectomies for cancer and lymphedema severe. Step three asks whether a
03 claimant's impairments meet or equal a listed impairment. The ALJ found that plaintiff's
04 impairments did not meet or equal the criteria of a listed impairment.

05 If a claimant's impairments do not meet or equal a listing, the Commissioner must
06 assess residual functional capacity (RFC) and determine at step four whether the claimant has
07 demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to
08 perform light work as defined in 20 C.F.R. § 404.1567(b) that does not require climbing of
09 ladders, ropes, or scaffolds; does not require crawling; requires only occasional balancing;
10 requires only occasional use of the right arm for any use in a right hand dominant person; and
11 requires only occasional exposure to vibrations and hazards such as open machinery, open
12 water, and open flames. With that assessment, the ALJ found plaintiff unable to perform her
13 past relevant work.

14 If a claimant demonstrates an inability to perform past relevant work, the burden shifts
15 to the Commissioner to demonstrate at step five that the claimant retains the capacity to make
16 an adjustment to work that exists in significant levels in the national economy. With the
17 assistance of a vocational expert, the ALJ found plaintiff capable of performing other jobs, such
18 as work as a laboratory sample carrier, shipping and receiving weigher, and ticket taker, all
19 classified as light in exertion and unskilled in level. When plaintiff became 55 years of age,
20 she was classified as an individual of advanced age as defined by the regulations. Because of
21 her reduced functional capacity, the ALJ found that the Medical-Vocational Rules supported a
22 finding of disability after that birthday, continuing through the date of the decision.

01 This Court's review of the ALJ's decision is limited to whether the decision is in
02 accordance with the law and the findings supported by substantial evidence in the record as a
03 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means
04 more than a scintilla, but less than a preponderance; it means such relevant evidence as a
05 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881
06 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which
07 supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278
08 F.3d 947, 954 (9th Cir. 2002).

09 Plaintiff argues that the ALJ failed to properly evaluate the medical evidence, her
10 testimony, and the lay evidence, and erred in assessing her RFC. She argues that, as a result of
11 these errors, as well as errors in the vocational expert testimony, the ALJ's step five finding is
12 erroneous. She requests remand for an award of benefits or, alternatively, for further
13 administrative proceedings. She also asks this Court to order her previous application for
14 benefits to be reopened. The Commissioner opposes reopening the previous application for
15 benefits and argues that the ALJ's decision is supported by substantial evidence and should be
16 affirmed.

17 Motion to Strike

18 As a preliminary matter, the Commissioner moves to strike Plaintiff's "Appendix of
19 Documentary Evidence" which was appended to Plaintiff's Opening Brief. (Dkt. 12-1.) The
20 Commissioner notes that counsel for plaintiff similarly filed a twenty four page brief and
21 nineteen page "appendix" in another recent case, *McCune v. Astrue*, No. C10-5074 (Dkt. 23), in
22 which counsel likewise asserted that the length and complexity of the case required the

01 additional briefing. Defendant disputed that characterization of the record in the *McCune*
02 case, and does so here as well. In response, and in apparent accord with mathematician Blaise
03 Pascal,² plaintiff's counsel filed a declaration describing the press of a heavy caseload and
04 difficulties occasioned by a back injury. (Dkt. 19-1.)

05 This Court does not find justification for the filing of an over-length brief in either the
06 length of the record or the nature of the issues presented. Nor would this Court have approved
07 the filing of an "Appendix of Documentary Evidence" as a device for circumventing the
08 Court's page-length restriction. Indeed, the Court notes that all of plaintiff's filings also
09 violated Local Rule CR 10(e)(1) in the utilization of a 1.5 line format, rather than the required
10 double spaced format, thus squeezing in even more words per page.

11 The Court has full access to the administrative record and all the hearing exhibits. A
12 lengthy summary of the record by either party serves no useful function, and violates this
13 Court's scheduling order. (Dkt. 7 at 2 ("**The parties shall not include a lengthy recitation of**
14 **background facts or medical evidence. Rather, a discussion of the relevant facts should**
15 **be included in the context of specific assignments of error.**") (emphasis in original).)
16 Plaintiff's counsel has been similarly cautioned by this Court recently. *Standley v. Astrue*,
17 C10-5725 (Dkt. 21 at 4); *Spencer v. Astrue*, C10-5661 (Dkt 19 at 4). Defendant's motion to
18 strike (Dkt. 16 at 3) plaintiff's "Appendix of Documentary Evidence" (Dkt. 12-1) is
19 GRANTED.

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22 2 "I have made this longer than usual, only because I have not had the time to make it shorter."
Blaise Pascal, *Lettres Provinciales*, Letter XVI (1657).

Medical Opinion Evidence

02 Plaintiff argues that the ALJ failed to properly evaluate all of the medical evidence. This
03 assignment of error is advanced by plaintiff by cataloguing items from the medical records that
04 were not mentioned by the ALJ in the Decision. (Dkt. 12 at 8-12.) The Commissioner argues
05 that plaintiff fails to present any substantive error in the ALJ's evaluation of the medical
06 evidence, failing to explain why any of the omissions are significant, probative, or resulted in
07 harmful error. The Court agrees with the Commissioner.

The ALJ need not discuss *all* evidence presented. Rather, the ALJ’s responsibility is to “explain why ‘significant probative evidence has been rejected.’” *Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984) (citing *Cotter v. Harris*, 642 F.2d 700, 706 (3d Cir. 1981)). The Court need not address an alleged assignment of error that is not argued with any specificity in the party’s briefing. *Carmickle v. Commissioner*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008). Although plaintiff provides somewhat more specificity in her reply brief (Dkt 19), arguments raised for the first time in a reply brief are waived. *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 n.8 (9th Cir. 2009) (“arguments not raised by a party in an opening brief are waived.”) (citing *Eberle v. Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990)).

Fundamentally, plaintiff asks for a different weighing of the evidence than that conducted by the ALJ. However, the findings of the Commissioner, if supported by substantial evidence, “shall be conclusive.” *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996); *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). Plaintiff has not established error in the ALJ’s consideration of the medical opinion evidence.

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Credibility

Absent evidence of malingering, an ALJ must provide clear and convincing reasons to reject a claimant's testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). *See also Thomas*, 278 F.3d at 958-59. In finding a social security claimant's testimony unreliable, an ALJ must render a credibility determination with sufficiently specific findings, supported by substantial evidence. "General findings are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "We require the ALJ to build an accurate and logical bridge from the evidence to her conclusions so that we may afford the claimant meaningful review of the SSA's ultimate findings." *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003). "In weighing a claimant's credibility, the ALJ may consider his reputation for truthfulness, inconsistencies either in his testimony or between his testimony and his conduct, his daily activities, his work record, and testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms of which he complains." *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). Another sufficient basis for rejecting claimant's subjective testimony is contradiction with the medical record. *Carmickle*, 533 F.3d at 1161.

18 Plaintiff argues that the ALJ fails to explain which parts of her testimony he found not
19 credible, citing the ALJ's finding that plaintiff's statements "concerning the intensity,
20 persistence and limiting effects of [her] symptoms are not credible prior to January 26, 2010 to
21 the extent they are inconsistent with the above residual functional capacity assessment." (Dkt.
22 12 at 14 (citing AR 19-20)). Plaintiff, however, misconstrues the excerpted finding, as the

01 ALJ goes on to explain the basis for the credibility assessment for several additional pages of
02 the decision. (AR 20-23.)

03 Plaintiff argues that the ALJ erred by rejecting her testimony because it was not
04 supported by objective evidence, citing the rejection of “the objective evidence test” by this
05 Circuit. (Dkt. 12 at 14 (citing, *inter alia*, *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998)
06 (“Once the claimant produces medical evidence of an underlying impairment, the
07 Commissioner may not discredit the claimant’s testimony as to the severity of symptoms
08 merely because they are unsupported by objective medical evidence.”)). However, the Court
09 agrees with the Commissioner that the ALJ did not rely solely on a lack of supporting objective
10 medical evidence to find plaintiff’s reports of symptoms less than credible. The ALJ may
11 properly consider the objective medical evidence in evaluating plaintiff’s subjective
12 complaints, so long as additional reasons are also provided. 20 C.F.R. § 404.1529(c)(2)
13 (“Objective medical evidence of this type is a useful indicator to assist us in making reasonable
14 conclusions about the intensity and persistence of your symptoms and the effect those
15 symptoms, such as pain, may have on your ability to work.... However, we will not reject
16 your statements...solely because the available objective medical evidence does not substantiate
17 your statements.”). In this case, the ALJ also cited reports by plaintiff to her providers
18 indicating that her symptoms were less bothersome or did not prohibit her from engaging in a
19 number of more vigorous activities, such as gardening, working as a landscaper, participating in
20 a Pilates class, or taking multiple vacations, as well as other daily activities. (AR 21-23.)

21 The ALJ also cited a lack of compliance with treatment as relevant to the consideration
22 of plaintiff’s complaints of pain and subjective symptoms, noting that plaintiff was a “no show”

01 to a scheduled follow-up examination (AR 655) and citing her failure to use her pressure
02 garment as advised, leading to increased right arm edema (AR 738). The ALJ noted that
03 plaintiff's symptoms were alleviated when she was compliant with recommended treatment,
04 acknowledging a relationship between plaintiff's lack of follow through with recommended
05 treatment due to lack of medical insurance benefits, but nevertheless concluding that "an
06 inability to afford treatment does not equate to a finding of disability." (AR 23.) Plaintiff
07 disputes the reasonableness of the ALJ's reliance on these isolated instances, and the
08 Commissioner concedes that the non-compliance was fairly minimal. However, the
09 Commissioner argues that the ALJ appropriately observed that plaintiff's symptoms were
10 alleviated when treatment recommendations were followed, finding this relevant to plaintiff's
11 claims of inability to work. (Dkt. 16 at 11.)

12 Plaintiff also challenges the ALJ's finding that some of plaintiff's activities show a
13 greater physical and mental functional ability than alleged, such as taking vacations, working in
14 her garden, or her ability to shop, clean, and cook. Plaintiff argues that there is no showing she
15 engaged in any inconsistent activities while on vacation, and urges the conclusion that her daily
16 activities are not inconsistent with her testimony. In response, the Commissioner argues that it
17 is not error for the ALJ to consider plaintiff's trips to Italy and Paris, or her ability to garden,
18 shop, clean, and cook, as inconsistent with her testimony that she is so incapacitated as to be
19 unable to perform the basic demands of work. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1040
20 (9th Cir. 2008) (finding travel to Venezuela for an extended time to undermine the plaintiff's
21 credibility). The Commissioner argues that the Court should not second-guess the ALJ's
22 evaluation of the evidence, so long as it is supported by substantial evidence. *Id.* *See also*

01 *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982) (“In reaching his findings, the [ALJ] is
02 entitled to draw inferences logically flowing from the evidence.”) The Commissioner argues
03 that plaintiff misconstrues the purpose of the ALJ’s consideration of these activities, noting the
04 ALJ found a contradiction between plaintiff’s ability to perform these activities and her
05 assertion that she is not able to work. The Commissioner argues that the ALJ’s conclusion was
06 reasonable and should not be disturbed.

07 Plaintiff also argues that the ALJ failed to provide convincing reasons for finding her
08 statements about her limitations not credible prior to January 26, 2010, but credible subsequent
09 to that date. (Dkt. 19 at 8.) However, this argument misstates the ALJ’s findings, which did
10 not address plaintiff’s credibility subsequent to the date in question. Because plaintiff had a
11 change in age categories on that date, her limitation to less than light functional capacity
12 rendered her disabled under the Medical-Vocational Guidelines thereafter. (AR 23.)

13 The Court finds the ALJ’s assessment of plaintiff’s credibility legally sufficient. The
14 ALJ properly relied on the medical evidence, finding few, if any, clinical deficits to account for
15 plaintiff’s claim of serious functional limitations that would preclude all work activity. (AR
16 22.) While noting that plaintiff did report symptoms of fatigue, the ALJ found that plaintiff
17 had “virtually no deficits in numerous physical examinations.” (*Id.*) The ALJ noted that
18 plaintiff was able to work in her garden for a number of hours without having problems with her
19 arm (AR 20, 21), and later reported that she was back at work as a landscaper. She repeatedly
20 reported pain levels of zero on scale of one to ten. (AR 20-22.) She traveled to Italy in
21 October 2008 (AR 21) and Paris in June 2009 (AR 22). She was able to perform activities of
22 daily living and manage a remodeling of her property. She attended Pilates class. (AR 22.)

01 As observed by the Commissioner: “[T]he ALJ’s interpretation of [plaintiff’s] testimony may
02 not be the only reasonable one. But it is still a reasonable interpretation and is supported by
03 substantial evidence; thus, it is not our role to second-guess it.” *Rollins v. Massanari*, 261 F.3d
04 853, 857 (9th Cir. 2001) (lack of corroborating objective findings properly considered) (citing
05 *Fair v. Bowen*, 885 F.2d 597, 604 (9th Cir. 1989)).

Lay Witness Testimony

7 Lay witness testimony as to a claimant's symptoms or how an impairment affects ability
8 to work is competent evidence. *Van Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996).
9 The ALJ can reject the testimony of lay witnesses only upon giving reasons germane to each
10 witness. *See Smolen*, 80 F.3d at 1288-89 (finding rejection of testimony of family members
11 because, *inter alia*, they were ““understandably advocates, and biased”” amounted to
12 “wholesale dismissal of the testimony of all the witnesses as a group and therefore [did] not
13 qualify as a reason germane to each individual who testified.”) (citing *Dodrill v. Shalala*, 12
14 F.3d 915, 918 (9th Cir. 1993)). *Accord Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001)
15 (“[L]ay testimony as to a claimant's symptoms is competent evidence that an ALJ must take
16 into account, unless he or she expressly determines to disregard such testimony and gives
17 reasons germane to each witness for doing so.”) “[W]here the ALJ's error lies in a failure to
18 properly discuss competent lay testimony favorable to the claimant, a reviewing court cannot
19 consider the error harmless unless it can confidently conclude that no reasonable ALJ, when
20 fully crediting the testimony, could have reached a different disability determination.” *Stout v.*
21 *Comm'r*, 454 F.3d 1050, 1056 (9th Cir. 2006).

22 Plaintiff notes that the ALJ did not discuss the written statements of J. Calloway, a

01 social security employee (AR 150-53), or Liliana Schuler, plaintiff's mother (AR 166-73). The
02 Commissioner concedes that the ALJ did not discuss the statements, but argues that any error
03 was harmless, since no reasonable ALJ could reach a different disability determination. In
04 response, plaintiff argues that the Commissioner's argument is a *post hoc* explanation and is
05 contrary to Ninth Circuit law requiring reversal if the lay witness evidence is disregarded
06 without comment. *Bruce v. Astrue*, 557 F.3d 1113, 1115 (9th Cir. 2009).

07 The Commissioner's harmless error argument is not a *post hoc* explanation, but a
08 correct statement of the law in this Circuit, which applies the harmless error rule to social
09 security cases and, specifically, to the evaluation of lay witness evidence by the ALJ. *Stout*,
10 454 F.3d at 1050. *See also McLeod v. Astrue*, 634 F.3d 881, 887 (9th Cir. 2011) (citing *Shinski*
11 v. *Sanders*, 129 S.Ct. 1696, 1706 (2009) ("[T]he burden is on the party attacking the agency's
12 determination to show that prejudice resulted from the error.")). The Commissioner argues
13 that neither lay witness statement was inconsistent with the ALJ's RFC finding. J. Calloway, a
14 social security employee, observed during an interview of plaintiff that her only apparent
15 physical limitation was a long sleeve on her arm that looked heavy and uncomfortable and that
16 plaintiff appeared unable to bend or flex her arm or move her fingers while wearing the
17 garment. The Commissioner argues that Ms. Schuler's statements, even if credited, would not
18 lead to a different disability conclusion, as she stated that plaintiff's limitations did not
19 significantly limit her ability to dress, shower, cook, do laundry, drive occasionally, attend yoga
20 classes, and lift approximately five pounds with her right arm.

21 Plaintiff argues only that the ALJ's failure to discuss the statements requires reversal,
22 but makes no argument that the error was harmful. The Court finds that this assignment of

01 | error fails.

Residual Functional Capacity

At step four, the ALJ must identify plaintiff's functional limitations or restrictions, and assess his work-related abilities on a function-by-function basis, including a narrative discussion. *See* 20 C.F.R. § 404.1545; Social Security Ruling (SSR) 96-8p. RFC is the most a claimant can do considering his or her limitations or restrictions. *See* SSR 96-8p. The ALJ must consider the limiting effects of all of plaintiff's impairments, including those that are not severe, in determining RFC. § 404.1545(e); SSR 96-8p.

09 Plaintiff argues that the ALJ improperly determined her RFC. She contends the ALJ
10 did not properly evaluate all the medical evidence, her testimony, or that of the lay witnesses.

11 As described previously, the Court does not find error in the ALJ's evaluation of
12 plaintiff's testimony or the lay witness evidence. As to the medical evidence bearing on the
13 assessment of her RFC, plaintiff argues that the ALJ should have included the opinions of Dr.
14 Werner, Dr. Buchanan, Dr. Ellis, and Ms. Davis that she has not been able to use her right arm
15 due to swelling and pain, and because use of her arm causes increased lymphedema. In
16 response, the Commissioner argues that the ALJ has the responsibility of determining RFC, and
17 no doctor's opinion is conclusive on this issue. The Commissioner argues that the ALJ's RFC
18 determination is supported by substantial evidence, and reflects the testimony of the medical
19 expert, Dr. Oguejiofor,³ who opined that plaintiff could engage in a limited range of light work

3 Dr. Oguejiofor's name was spelled phonetically by the court reporter as "Aringifore". (AR
35.) Although plaintiff argues that there is no evidence that Dr. Oguejiofor considered her testimony in
formulating his opinion, the doctor testified at the administrative hearing, so it seems obvious that he
heard and considered plaintiff's testimony. (AR 31.)

01 with manipulative limitations involving occasional use of the right arm and occasional
02 fingering. (AR 71-72.)

03 The Commissioner further argues that plaintiff fails to offer any substantive analysis as
04 to why the opinions of the other providers undermine the ALJ's RFC assessment, and contends
05 that a review of the pages cited by plaintiff from the administrative record (AR 296, 378, 383,
06 627, and 733) do not support her contentions.⁴ By way of example, the Commissioner cites
07 Dr. Werner's February 2008 chart note wherein he noted plaintiff's subjective complaint that
08 she was unable to work due to her lymphedema, but also noted that "[c]urrently she is feeling
09 very well" and was experiencing only "mild lymphedema". (AR 296.) Dr. Buchanan's
10 opinions about plaintiff's significant disability were made in the context of plaintiff's previous
11 employment running a nursery, which was described as "a very physical job" requiring
12 repetitive motions which exacerbated her symptoms. (AR 378.) Dr. Ellis felt that plaintiff was
13 not able to continue to work as a gardener because it caused her lymphedema to worsen, but felt
14 she would be a candidate for job training. (AR 382-83.) Likewise, Ms. David did not opine
15 that plaintiff would be completely unable to work, and recommended she look into alternative
16 career choices. (AR 627.) The Commissioner argues that none of these opinions undermine
17 the ALJ's RFC assessment that plaintiff was capable of light work with additional limitations.
18 Considering all of the above, the Court finds that plaintiff has not established error in the ALJ's
19 RFC assessment.

20 Consistent with plaintiff's argument that the ALJ erred in finding her capable of

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22 4 Plaintiff again incorrectly characterizes the Commissioner's argument in this regard as *post*
hoc rationale. (Dkt. 19 at 11.) Plaintiff apparently misperceives her burden as the appealing party to
show that any alleged error is prejudicial.

01 performing light work, she contends that she meets the requirements set forth in
02 Medical-Vocational Rule 201.14, which would direct a finding of disabled for a claimant who
03 has attained the age of fifty, with non-transferrable skills, is a high school graduate, and is
04 limited to sedentary work. 20 C.F.R. Ch. III, Pt. 404, Subpt. P, App. 2, Rule 201.14.
05 However, because the Court does not find error in the ALJ's RFC assessment that plaintiff was
06 capable of light work with additional limitations, this related argument is moot and need not be
07 addressed.

Vocational Expert Testimony

If plaintiff has demonstrated she has a severe impairment that prevents her from doing her past relevant work, she has made a *prima facie* showing of disability. *Tackett v. Apfel*, 180 F.3d 1094, 1101 (9th Cir. 1999). The burden then shifts to the Commissioner at step five to demonstrate that, in light of the claimant’s RFC, age, education, and work experience, she can perform other types of work that exist in “significant numbers” in the national economy. *Id.*; 20 C.F.R. § 404.1520(f). An ALJ can determine this issue by calling upon a vocational expert (VE) for assistance. *Tackett*, 180 F.3d at 1100. In such a scenario, the ALJ must provide the VE with an accurate and detailed description of the claimant’s impairments, as reflected by the medical evidence of record. *Id.* at 1101. An ALJ may, however, exclude restrictions in a hypothetical question that are not supported by substantial evidence. *Osenbrock v. Apfel*, 240 F.3d 1157, 1164-65 (9th Cir. 2001).

In this case, the ALJ found plaintiff unable to perform her past relevant work as a wallpaper hanger, both as actually and as generally performed. (AR 23.) The ALJ asked the VE if jobs exist in the national economy which plaintiff would be capable of performing. The

01 VE identified the jobs of laboratory sample carrier, shipping and receiving weigher, and ticket
02 taker, all of which were light and unskilled. (AR 24-25, 75-78.) Therefore, the ALJ found
03 plaintiff not disabled.

04 Plaintiff argues the ALJ erred by failing to include all of her limitations in the
05 hypothetical question posed to the VE, as described in her testimony and in the medical
06 evidence from Dr. Werner, Dr. Buchanan, Dr. Ellis, and Ms. David. However, this Court has
07 previously found that the ALJ did not err in the consideration of this medical opinion evidence,
08 or in considering the credibility of plaintiff's testimony. *See Batson v. Comm'r of the SSA*, 359
09 F.3d 1190, 1197 (9th Cir. 2004) (ALJ need not include in the RFC assessment properly
10 discounted opinion evidence or claimant testimony) and *Thomas*, 278 F.3d at 956 (a
11 hypothetical posed to a VE must include all of the claimant's functional limitations *supported*
12 *by the record*) (citing *Flores v. Shalala*, 49 F.3d 562, 520-71 (9th Cir. 1995)).

13 Plaintiff also argues the ALJ erred by relying on VE testimony which deviated from the
14 Dictionary of Occupational Titles (DOT). Plaintiff points to the VE's testimony that the jobs
15 of laboratory sample carrier, shipping and receiving weigher, and ticket taker could be
16 performed by a right-hand dominant individual who was limited to "only occasional use of her
17 right hand for anything". (AR 75.) The VE also confirmed that this testimony was consistent
18 with the DOT. (*Id.*) Plaintiff contends the jobs as described by the VE are not consistent with
19 the DOT, contending that the laboratory sample carrier and ticket taker jobs both require
20 frequent reaching and handling and occasional fingering, and the shipping and receiving
21 weigher job requires frequent handling and occasional reaching and fingering, all of which
22 would exceed the ALJ's hypothetical limiting the individual to only occasional use of the right

01 arm. Plaintiff also argues the VE recanted the assertion that her testimony was consistent with
02 the DOT.

03 Responding, the Commissioner argues that plaintiff fails to show a genuine unresolved
04 conflict between the VE's testimony and the DOT. The VE clarified that there are variations
05 between the specific DOT "recipe or prescription" for an occupation and "how it might actually
06 be performed in the national economy". (AR 82.) Therefore, the Commissioner argues, any
07 conflict between the VE's testimony and the DOT was adequately resolved.

08 The Court finds it necessary to remand this matter to allow the ALJ to clarify the step
09 five finding. As required, the ALJ asked the VE if her testimony about the availability of
10 alternative jobs was consistent with the DOT, and the VE answered in the affirmative. (AR
11 74); *Massachi v. Astrue*, 486 F.3d 1149, 1152-54 (9th Cir. 2007). See also *Pinto v. Massanari*,
12 249 F.3d 840, 847 (9th Cir. 2001) ("We merely hold that in order for an ALJ to rely on a job
13 description in the [DOT] that fails to comport with a claimant's noted limitations, the ALJ must
14 definitively explain this deviation.") However, on cross-examination, the VE testified that the
15 jobs, as defined in the DOT, require more than occasional use of one arm, while explaining that
16 the jobs as performed in the national economy vary from the DOT in that regard. (AR 82.) The
17 ALJ did not address this disparity in the decision. While the ALJ may rely on the VE's
18 testimony that conflicts with the DOT, the ALJ must determine "whether the vocational
19 expert's explanation for the conflict is reasonable and whether a basis exists for relying on the
20 expert rather than the *Dictionary of Occupational Titles*." *Massachi*, 486 F.3d at 1153. Until
21 the ALJ addresses this issue, this Court can neither determine whether the ALJ properly relied
22 on the testimony of the VE or whether substantial evidence supports the ALJ's step five

finding. *Id.* at 1154 (vacating in part and remanding the case to allow the ALJ to make the required findings).

Remand

The decision whether to remand for further proceedings or order an immediate award of benefits is within the Court’s discretion. *See Harmen v. Apfel*, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no useful purpose would be served by further administrative proceedings, or where the record has been fully developed, it is appropriate to exercise this discretion to direct an immediate award of benefits. *Id.* at 1179 (noting “that the decision of whether to remand for further proceedings turns upon the likely utility of such proceedings”). However, where there are outstanding issues that must be resolved before a determination of disability can be made, and it is not clear from the record that the ALJ would be required to find the claimant disabled if all the evidence were properly evaluated, remand is appropriate. *Id.* Here, remand for further proceedings is appropriate to allow the ALJ to remedy the above mentioned errors.

Reopening Earlier Disability Claim

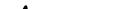
16 Plaintiff contends that the ALJ *de facto* opened plaintiff's prior application for disability
17 benefits by considering all of the evidence submitted as part of the earlier application, noting
18 that the previous denial was less than one year prior to the filing of her current application.
19 The Commissioner disagrees, arguing the ALJ made no specific findings regarding the issue of
20 reopening the prior decision because the ALJ's decision was unfavorable for the time period in
21 question. On remand, if the ALJ's decision relating to the period prior to January 26, 2010 is
22 favorable to the plaintiff, the ALJ should make specific findings regarding the issue of

⁹¹ reopening the prior application. 20 C.F.R. § 404.992.

CONCLUSION

03 For the reasons set forth above, this matter should be remanded to allow the ALJ to
04 clarify the basis for the step five finding.

05 DATED this 8th day of September, 2011.



Mary Alice Theiler
United States Magistrate Judge